

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ENCOMPASS INSURANCE
COMPANY, as subrogee of Stephen and
Stephanie Phillips,

Plaintiff,

v.

NORCOLD INC.,

Defendant.

CASE NO. 2:23-cv-231

ORDER

ESSENTIA INSURANCE COMPANY,

Intervention Plaintiff,

v.

NORCOLD INC.,

Intervention Defendant.

The Court raises this matter sua sponte.

Subrogation-plaintiff Encompass Insurance Company (“Encompass”) brings this product liability suit against Defendant Norcold, Inc. (“Norcold”), alleging that a defective Norcold refrigerator caused a fire that destroyed Stephen and Stephanie

1 Phillips' ("insureds") garage building, recreational vehicle ("RV"), and other
2 property. Dkt. No. 1-2. Now before the Court is Norcold's motion for sanctions for
3 spoliation. Dkt. No. 55.

4 In this motion, Norcold argues that Encompass wrongfully destroyed
5 material evidence when it authorized demolition of the insureds' garage building
6 and RV before Norcold could inspect the fire scene. Dkt. No. 55. Encompass
7 counters that it authorized demolition of the fire scene to mitigate damages, and
8 that it dutifully preserved the only three items of evidence that its expert identified
9 as possible ignition factors: the Norcold refrigerator, a nearby heating machine, and
10 a nearby dehumidifier. Dkt. No. 57. But in its reply, Norcold disputes the notion
11 that these three items were indeed "the only possible ignition sources for the fire[.]"
12 Dkt. No. 65 at 4 (quoting Dkt. No. 57 at 8). To the contrary, Norcold asserts that the
13 garage building's electrical system, as well as the RV's electrical system, may have
14 caused the fire. *Id.* at 4-6. In support of this argument, Norcold cites and attaches
15 an expert report ("Perryman Report") aiding its position. *See* Dkt. No. 65-2.

16 Norcold presents this argument, backed by the Perryman Report, for the first
17 time in its reply brief. "Ordinarily, the Court will not consider issues raised for the
18 first time in a reply brief." *Yageo Am. Corp. v. Tseng*, No. C06-0227RSL, 2006 WL
19 8454994, at *1 (W.D. Wash. Apr. 21, 2006). "District courts in this Circuit have
20 ruled that 'it is improper for a party to raise a new argument in a reply brief[.]'
21 largely because the opposing party may be deprived of an opportunity to respond."
22 *Id.* (quoting *United States v. Boyce*, 148 F. Supp. 2d 1069, 1085 (2001)). But a
23 "district court [has] discretion to consider [an] issue even if it was raised in a reply

1 brief.” *See Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1202 (9th Cir. 2001). “In
2 particular, a surreply filed by the non-moving party may afford an adequate
3 opportunity to respond.” *Yageo Am. Corp.*, 2006 WL 8454994, at *1 (citing *Cedar-*
4 *Sinai Med. Center v. Shalala*, 177 F.3d 1126, 1129 (9th Cir. 1999)).

5 The Court finds that it was improper for Norcold to present the conclusions
6 from the Perryman Report for the first time in its reply brief. To ensure that
7 Encompass has a full and fair opportunity to respond, the Court sua sponte grants
8 Encompass FOURTEEN (14) days to file an optional sur-reply of no more than
9 FIVE (5) pages addressing only those matters raised for the first time in Norcold’s
10 reply brief.

11 It is so ORDERED.

12 Dated this 26th day of December, 2024.

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14 Jamal N. Whitehead
15 United States District Judge
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